Koperasi Pasaraya Malaysia Bhd v UDA Holdings Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — WRIT NO S6-21-153 OF 1997
AZMEL J
19 OCTOBER 2002

Land Law — *Temporary occupation licence — Rights under licence, nature of — Whether granting of temporary occupation licence on road was valid — Act of Government deemed valid unless otherwise ordered by court — No application for judicial review or declaratory order against act of Government — Whether it was wrong for plaintiff to allege that temporary occupation licence invalidly granted*

Public Authorities — *Civil procedure — Parties — Claim against Government — Principal cause of action against defendants was based on public nuisance — Whether requirements under s 8(1) of Government Proceedings Act 1956 complied with — Whether plaintiff showed special damages arising from public nuisance — Whether plaintiff obtained prior consent of Attorney General for relator action to bring the present suit — Effect of failure to obtain consent of Attorney General — Whether fatal to plaintiff's action*

By way of this writ action, the plaintiff claimed against the first and second defendants for, inter alia, an order that the 76 stalls on Lorong Haji Hussein Tiga, Kuala Lumpur be demolished and Lorong Haji Hussein be immediately restored to its former state by the first and second defendants at their costs and expense. The preliminary issue to be determined was whether the granting of the temporary occupation licence ('TOL') on Lorong Haji Hussein Tiga was valid. The events that led to the grant of the TOL were that the stall owners had trespassed into and carried business activities on the first defendant's property. By a consent order, the stall owners agreed to vacate the first defendant's land in return for the first defendant granting them permission to carry on their business activities on temporary stalls constructed along Lorong Haji Hussein Tiga. The stalls were subsequently constructed by the first defendant on Lorong Haji Hussein Tiga by virtue of the TOL issues to the first defendant by the Government of Malaysia ('the third defendant') in accordance with s 67 of the National Land Code 1965. By Gazette, the second defendant issued a notice under s 70(2) of the Road Transport Act 1987 informing affected parties of the proposed closure of Lorong Haji Hussein Tiga and requested persons who wanted to make an objection to the proposed road closure to lodge their written objections with the second defendant. A similar notice was also posted opposite the plaintiff's supermarket. As the second defendant did not receive any objections regarding the proposed road closure, Lorong Haji Hussein Tiga was subsequently closed to traffic with effect from 14 August 1997 until 31 July 1999. Since 12 November 1999, the stall owners took possession and occupied the 76 stalls along Lorong Haji Hussein Tiga.

Held:

(1) The TOL was given by the Government of Malaysia to the first defendant. An act of the Government was deemed to be valid unless otherwise ordered by the court and the only way to invalidate an act of the Government was to apply for an order of mandamus, prohibition or certiorari by way of judicial review. Alternatively, the aggrieved party can apply for a declaratory order against the act of the Government. In the instant case, neither of the applications was made and as such, it was wrong for the plaintiff to allege that the TOL was invalidly granted. Accordingly, the administrative decision of the third defendant was valid and enforceable (see pp 178H–179B).

(2) The plaintiff's counsel admitted that the plaintiff's principal cause of action against the defendants was based on public nuisance and in order for the plaintiff to bring an action based on public nuisance, it must comply with the requirements under s 8(1) of the Government Proceedings Act 1956 ('the Act'). In this regard, two requirements must be fulfilled. The plaintiff must show special damages arising from the public nuisance and secondly, the plaintiff must obtain the prior consent of the Attorney General for relator action to bring the present suit. Here, the plaintiff had failed to comply with the requirements of s 8(1) of the Act as it had not obtained the consent of the Attorney General for a relator action. This failure was tantamount to a nullity incapable of being cured. In the circumstances, this action had to be struck off (see pp 179H–I, 180F–G, 182E–F).

[Bahasa Malaysia summary

Melalui tindakan writ ini, plaintif menuntut terhadap defendan pertama dan kedua untuk, antara lain, satu perintah supaya 76 gerai di Lorong Haji Hussein Tiga, Kuala Lumpur diruntuhkan dan Lorong Haji Hussein dikembalikan kepada keadaan dahulu dengan segera oleh defendan pertama dan kedua atas kos dan perbelanjaan mereka sendiri. Isu yang pertama untuk ditentukan adalah sama ada pemberian lesen penghunian sementara ('LPS') di Lorong Haji Hussein Tiga adalah sah. Peristiwa yang membawa kepada pemberian LPS adalah bahawa pemilik gerai telah mencerobohi dan menjalankan perniagaan di tanah defendan pertama. Menerusi satu perintah persetujuan, pemilik gerai bersetuju mengosongkan tanah defendan pertama dan sebagai balasan defendan pertama memberikan izin menjalankan perniagaan mereka di gerai sementara yang dibina di sepanjang Lorong Haji Hussein Tiga. Gerai-gerai tersebut kemudian dibina oleh defendan pertama di Lorong Haji Hussein Tiga disebabkan pengeluaran LPS kepada defendan pertama oleh Kerajaan Malaysia ('defendan ketiga') menurut s 67 Kanun Tanah Negara 1965. Melalui Warta, defendan kedua mengeluarkan notis di bawah

s 70(2) Akta Pengangkutan Jalan Raya 1987 memberitahu pihak yang terjejas mengenai penutupan yang dicadangkan ke atas Lorong Haji Hussein Tiga dan meminta sesiapa yang ingin membantah kepada penutupan jalan supaya mengemukakan bantahan bertulis kepada defendan kedua. Notis yang serupa juga ditampal bertentangan pasaraya plaintif. Oleh kerana defendan kedua tidak menerima apa-apa bantahan mengenai penutupan jalan yang dicadangkan, Lorong Haji Hussein Tiga kemudian ditutup kepada lalulintas mulai 14 Ogos 1997 sehingga 31 Julai 1999. Sejak 12 November 1999, pemilik gerai telah mengambil milik dan menduduki 76 gerai di sepanjang Lorong Haji Hussein Tiga.

Diputuskan:

(1) LPS diberi oleh Kerajaan Malaysia kepada defendan pertama. Satu tindakan Kerajaan dianggap sah melainkan diperintah sebaliknya oleh mahkamah dan satu-satunya cara untuk membatalkan satu tindakan Kerajaan adalah untuk memohon perintah mandamus, larangan atau certiorari melalui kajian semula kehakiman. Sebagai alternatif, pihak yang terkilan boleh memohon perintah perisytiharan terhadap perbuatan Kerajaan. Dalam kes ini, tidak satupun permohonan dibuat dan dengan itu, adalah salah untuk plaintif mengatakan bahawa LPS diberi secara tak sah. Justeru itu, keputusan pentadbiran defendan ketiga adalah sah dan boleh berkuatkuasa (lihat ms 178H–179B).

(2) Peguam plaintif mengaku bahawa kausa tindakan utama plaintif terhadap defendan-defendan adalah berdasarkan gangguan awam dan untuk membolehkan plaintif membawa satu tindakan berdasarkan gangguan awam, ia mesti mematuhi keperluan di bawah s 8(1) Akta Prosiding Kerajaan 1956 ('Akta tersebut'). Berhubung ini, dua keperluan mesti dipenuhi. Plaintif mesti menunjukkan ganti rugi khas yang timbul dari gangguan awam dan kedua, plaintif mesti memperolehi kelulusan terdahulu peguam negara atas tindakan berkait untuk memulakan guaman ini. Di sini, plaintif telah gagal mematuhi keperluan s 8(1) Akta tersebut kerana ia tidak memperolehi kebenaran Peguam Negara untuk tindakan berkait. Kegagalan ini sama seperti pembatalan yang tidak dapat dipulihkan. Dalam keadaan demikian tindakan ini haruslah dibatalkan (lihat ms 179H–I, 180F–G, 182E–F).]

Notes

For cases on parties in civil procedure, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1537–1538.

For cases on rights under license, nature of temporary occupation license, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3937–3944.

Cases referred to

Chong Sin Onn v Kuching Municipal Council [1967] 1 MLJ 21 (distd)
South Johore Omnibus Sdn Bhd v Express [1983] 1 MLJ 101 (folld)

Legislation referred to

Government Proceedings Act 1956 s 8(1)
National Land Code 1965 s 6
Road Transport Act 1987 s 70(2)
Rules of the High Court 1980 O 53

A Kanesalingam (*N Jayakumar* with him) (*Kanesalingam & Co*) for the plaintiffs.
Zulkifly Nordin (*Zulkifly Nordin & Assoc*) for the first defendant.
Victoria Martin (*Shook Lin & Bok*) for the second defendant.
Abu Bakar Jais (Attorney General's Chambers) for the third defendant.

Azmel J: By way of a writ action, the plaintiff claimed against the defendants as follows:

(1) against the first and second defendants, an order that the 76 stalls be demolished and the public street restored to its former state immediately by the first and second defendants at the cost and expense of the first and second defendants and as against the third defendant a declaration that the said 76 stalls be demolished;

(2) an order that the second and third defendants do immediately at their own cost and expense demolish or cause to be demolished the building known as Cawangan UMNO constructed on Lorong Haji Hussein Dua in front of City Park Hotel; and as against the third defendant a declaration that the said building be demolished;

(3) losses;

(4) interest on (3) at 8%pa from the date hereof till full realization;

(5) any further on other relief as this honourable court deems fit; and

(6) costs of this action.

It is to be noted that defendants, Nos 4–42 were included in their capacities as respective owners of the 76 stalls on Lorong Haji Hussein Tiga.

The case was fixed for hearing on 6 December 1999. Counsel for the plaintiff, Mr A Kanesalingam, in his opening remarks said:

> The TOL licence in the middle of the road is invalid. The approval was invalidly given.

Realizing that the counsel for the plaintiff's remarks involved a very important question of law arising from this action, I decided that it would facilitate the court proceedings if the counsel's allegation could be forthwith determined as a preliminary issue. The issue that I wanted to be determined was:

Whether the granting of the Temporary Occupational Licence (TOL) on Lorong Haji Hussein Tiga on which the 76 stalls were constructed was valid. A

In the circumstances, I instructed all the counsels involved in this case to furnish their written submissions in respect of the above preliminary issue. After having considered all the submissions furnished to me as well as other documents produced in court related to this issue, I arrived at the conclusion that the said TOL on Lorong Haji Hussein Tiga had been validly issued by third defendant to the first defendant. B

Before starting to give my reasons for arriving at that conclusion, I feel it is pertinent to state the brief background leading to the issuance of the TOL.

C

The fourth to the 42nd defendants had trespassed into and carried business activities on a piece of land known as Lot 2347, Jalan Raja Bot, Kuala Lumpur which belonged to the first defendant. The first defendant had commenced action for vacant possession against the fourth to 42nd defendants vide Kuala Lumpur High Court Civil Case No S5–22–491–1997. Through a consent order dated 11 November 1997, the fourth to 42nd defendants agreed to vacate the said land in return for the first defendant offering them permission to carry out their business activities on temporary stalls constructed along Lorong Haji Hussein Tiga. D

The said 76 stalls were subsequently constructed by the first defendant on Lorong Haji Hussein Tiga by virtue of a TOL issued to the first defendant by the third defendant in accordance with s 67 of the National Land Code 1965. Before constructing the said stalls, the first defendant had obtained all the necessary building approvals from the relevant departments of the second defendant. E

Through Warta Kerajaan No 3775 dated 8 May 1997, the second defendant had issued of the otice under s 70(2) Road Transport Act 1987 informing affected parties of the proposal to close Lorong Haji Hussein Tiga and requested any person who wished to make objection in writing to the said proposal. Similar notice had also been pasted at Lorong Haji Hussein Tiga opposite the plaintiff's supermarket. However the second defendant had not received any specific written objection from anybody including the plaintiff. As such, the second defendant issued Perintah Pengangkutan Jalan (Larangan Penggunaan Jalan) (Bandaraya Kuala Lumpur) (No 6) 1997 prohibiting driving of any form of vehicles on Lorong Haji Hussein Tiga wef 14 August 1997 till 31 July 1999. F G

Since 12 November 1999, the fourth to 42nd defendants had taken possession and occupied the 76 stalls at Lorong Haji Hussein Tiga. H

With that brief background, I shall now state my reasons for arriving at the conclusion that the TOL was validly given. They are as follows.

Firstly, the TOL was given by the third defendant to the first defendant. The third defendant is Kerajaan Malaysia. An act of the Government ('first defendant') is deemed to be valid unless otherwise ordered by the court. The only way to invalidate an act or decision of the third defendant is by applying for an order of mandamus, prohibition or certiorari by way of I

judicial review. The procedures for making such application are clearly stated under O 53 of the Rules of the High Court 1980 ('the RHC'). There are of course cases where aggrieved parties can also apply for declaratory orders against the act or decision of the third defendant and the prayer must be in the form of a declaration. However, no such application by way of judicial review under O 53 of RHC had been made. Neither was there any application for a declaration seeking a court ruling that the TOL was invalid. In the absence of such application for judicial review or application for declaratory order in respect of the act of the third defendant giving TOL to the first defendant on Lorong Haji Hussein Tiga it is wrong to allege that the TOL was invalidly granted. In the circumstances I ruled that the administrative decision of the third defendant was valid and enforceable. An appeal to the Court of Appeal against my ruling on this preliminary issue has been filed by the plaintiff.

I wish to point out that in the course of giving the submissions, the counsel for the defendants had also prayed that the plaintiff's action be struck off because the nature of the main prayer filed by the plaintiff was for an order of demolition of the said 76 stalls by the first and second defendants. As such the proper procedure to be taken by the plaintiff should be by way of judicial review under O 53 of the RHC. However, I was quite reluctant to accede to their request for the simple reason that if the defendants had really intended to strike off the plaintiff's claims it would be necessary and proper for the defendants to file a formal application to that effect. I did not have before me such proper and formal application to strike off the plaintiff's writ and statement of claims by any of the defendants. In the circumstances I ordered the hearing of this action to proceed.

The plaintiff called its first witness, Mohd Tahir bin Md Hassan ('PW1') who is the general manager of the plaintiff. At the commencement of the hearing, I requested counsels that evidence of witnesses must first of all be confined to prove the issue of liability. If liability has been proven then only can witnesses be called to prove quantum of damages. My reason for making this request was basically to save time. There could be cases where the issue of liability is not proved. In such a situation, the hearing can be concluded without the need to go to the second stage of proving quantum of damages. All counsels did not raise any objection concerning this request as to the manner of the giving of evidence by witnesses.

After PW1 had completed giving his evidence on the question of liability, Mr A Kanesalingam applied for permission to allow PW1 to proceed straightaway to prove damages. In the light of my earlier request, I tried to stop him from doing so and told him that if the issue of liability is proved then PW1 can be recalled to prove damages. However, Mr A Kanesalingam insisted that PW1 be allowed to continue giving evidence in respect of damages suffered by the plaintiff. He said the plaintiff's *principal cause of action* against the defendants was based on *public nuisance*. And in order to prove public nuisance, it would be essential to show *pecuniary damages* caused to the plaintiff. He referred to s 8(1) of the Government Proceedings Act 1956 of the need to also prove pecuniary damages. He read s 8(1) of the said Act in court.

In the light of the persistent request by Mr A Kanesalingam and categorically admitting that the basis of the plaintiff's cause of action against the defendants (mainly defendants Nos 1–3) was on public nuisance, I decided to stall further hearing in order to decide on another preliminary issue, that is, concerning the interpretation of s 8(1) of the Government Proceedings Act 1956. Towards that purpose I instructed all counsels to give their written submissions in respect of the interpretation of s 8(1) of the Government Proceedings Act 1956. Section 8 of the Government Proceedings Act 1956 states:

> Public nuisances
>
> (1) In the case of a public nuisance the Attorney General, or two or more persons having obtained the consent in writing of the Attorney General, may institute a suit, though no special damages has been caused for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.
>
> (2) Nothing on this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.
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> (3) The powers of the Attorney General under this section shall, subject to any directions of the Attorney General, be exercisable by the State Attorney General.

After having considered counsels' submission on the issue, I made the ruling that in order for the plaintiff to bring an action based on public nuisance, it must conform and comply with requirements under s 8(1) of the Government Proceedings Act 1956. One of the requirements was that the plaintiff must obtain the consent of the Attorney General for a relator action. And in this case, it was my finding that the plaintiff had failed to comply with the requirements under s 8(1) of the Government Proceedings Act 1956 in that the plaintiff failed to obtain the consent of the Attorney General for a relator action. In my view, such failure tantamounts to a nullity incapable of being cured. In the circumstances, I had no other choice but to order this proceedings be forthwith struck off with costs.

After having considered the provisions of s 8(1) of the said Act, I was of the view that in order for the plaintiff to bring an action based on public nuisance, two requirements must be fulfilled. Firstly, it must show special damages arising from the public nuisance and secondly it must obtain prior consent of the Attorney General for relator action to bring this suit.

Counsel for the plaintiff contended that under s 8(1) the plaintiff is only required to prove pecuniary or special damages. There is no need for the plaintiff to obtain the Attorney General's consent to relator proceedings if it can prove special damages. However counsels for the first, second and third defendants strongly contended that it is essential for the plaintiff to obtain the consent of the Attorney General for a relator action to bring this suit.

In my view, the relevant authority in respect of the construction of s 8(1) of the Government Proceedings Act 1956 is found in the case of

South Johore Omnibus Sdn Bhd v Damai Express [1983] 1 MLJ 101. In construing s 8 of the Government Proceedings Act 1956, Yusoff Mohamed J (as he then was) said at p 103:

> In our country except in cases falling under section 80 of the Local Government Act 1976, section 8 of the Government Proceedings Act 1956 applies to relator action. The provision states:
>
> '8(1) In the case of a public nuisance the Attorney General, or two or more persons having obtained the consent in writing of the Attorney General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.'
>
> Having regard to this provision, in my view, if the plaintiff can show that this suit is founded on public nuisance they can sue on the relation of the Attorney General and not otherwise.
>
> In *Majlis Perbandaran Pulau Pinang v Boey Siew Than & Ors* [1979] 2 MLJ 127, Raja Azlan Shah CJ at 129, speaking on the application of section 8 of the Government Proceedings Act, and Local Government Act 1976 (Act 171) says:
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> > 'In our view, the section speaks so plainly that it is clear from its terms that Parliament had intended to release a local authority from the obligation to sue on a relator action and not on their own, where they are taking proceedings at law to abate a public nuisance on public or private premises within their own area in protection of the public interest.'

Based on the decision of *South Johore Omnibus*, it is essential that in Malaysia to institute an action based on public nuisance you must conform and comply with s 8 of the Government Proceedings Act 1956. In order to bring an action based on public nuisance, a plaintiff must not only prove that it had suffered special damages but also to obtain consent from the Attorney General in a relator action. The plaintiff's action in the *South Johore Omnibus* case was dismissed because consent of the Attorney General in a relator action was not obtained.

The plaintiff's action in this case as categorically admitted by the plaintiff's counsel was based on public nuisance. It is therefore essential that it must present its case on the basis of public nuisance. The term 'public nuisance' is defined by *Clerk & Lindsell on Torts* as follows:

> A public nuisance is a criminal offence, and is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty's subjects.

In this case since Mr A Kanesalingam, counsel for the plaintiff had admitted that the plaintiff's action was based on public nuisance within the meaning of s 8(1) of the Government Proceedings Act 1956 it is essential that it must satisfy the court that it has complied with the requirements of s 8 of the said Act. However, counsel for the plaintiff contended all the plaintiff needed to do was to prove that the plaintiff suffered special damages. And there is no need for the plaintiff to obtain the consent of the Attorney General for a relator action.

In support of its case, the plaintiff had referred to the case of *Chong Sin Onn v Kuching Municipal Council* [1967] 1 MLJ 21 where the plaintiff sought a declaration against the defendant for causing obstruction by constructing a rail in front of the plaintiff's clinic between it and the street. The action was however dismissed *because the plaintiff had not suffered any pecuniary damage.*

In my view the authority cited by the plaintiff must be distinguished because nowhere in the judgment had the learned judge ever referred to s 8 of the Government Proceedings Act 1956. Therefore, *Kuching Municipal Council*'s case could not support the plaintiff's argument because in the decision of that case no mention in respect of the interpretation of s 8 had been made by the judge.

It must also be borne in mind that I had earlier on made a ruling that the TOL was validly granted by the third defendant to the first defendant. Since there did not appear to be any written objections to the construction of the 76 stalls as well as the closure of Lorong Haji Hussein Tiga after the notice of the closure had been issued, it can also be ruled that the 76 stalls were validly constructed and the closure of Lorong Haji Hussein Tiga was validly notified. Because there had been no application by any aggrieved party either by way of judicial review or declaration to set aside the grant of TOL by the third defendant and also the construction of the 76 stalls by the first defendant as well as the closure of Lorong Haji Hussein Tiga by the second defendant, the validity of such acts remained effective.

In the light of the circumstances as I have stated above, I arrived at the conclusion that the plaintiff failed to comply with the requirements of s 8 of the Government Proceedings Act 1956 by failing to obtain the consent of the Attorney General to institute a relator action. Therefore, the plaintiff's action before this court was improper. As such, I ordered that the plaintiff's action be struck off. I also ordered costs be paid by the plaintiff to the first, second and third defendants.

Order accordingly.

Reported by Lim Lee Na